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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 542

31415 #2
HOU-IL

N. S. HOUSMAN,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Petition for Writ of Certiorari and Brief In Support Thereof

To the District Court of Appeal of the State of California, First Appellate District, Division Two.

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In the Supreme Court of the United States

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No.....

N. S. HOUSMAN,
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THE PEOPLE OF THE STATE OF CALIFORNIA,
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PETITION FOR WRIT OF CERTIORARI

To the District Court of Appeal of the State of California, First Appellate District, Division Two.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The petition of N. S. Housman for a writ of certiorari to the District Court of Appeal of the State of California, First Appellate District, Division Two, respectfully shows:

STATEMENT OF THE CASE.

Petitioner, a licensed physician, was indicted, tried and convicted in the Superior Court of the State of California of two charges violating Section 118 of the California Penal Code (perjury), two violations of Section 132 of the Penal Code (offering false evidence) and two violations of Section 134 of the Penal Code (preparing false evidence).

On August 30, 1939, two complaints, numbered respectively 423,409 and 423,410, were filed in the Municipal Court of San Francisco, each charging the petitioner with having violated, on August 30, 1939, Section 1-d of the State Narcotic Act, which provided that any doctor authorized to issue prescriptions for narcotics must keep a record of the name and address of the person to whom issued, the date when issued, the character and quantity of the drug prescribed and the purpose for which such prescription was issued. These two cases were consolidated and tried together in the Municipal Court, before a jury, the trial starting on September 26, 1939, and ending on October 5, 1939, when the jury returned verdicts finding the defendant not guilty. (These consolidated actions will be referred to as "the first Municipal Court trial".)

At the first Municipal Court trial the State relied on petitioner's failure to keep a record of a prescription for narcotics issued to A. E. Black for morphine

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(Note: All page references herein are to the certified Clerk's Transcript (C. T.) and Reporter's Transcript (R. T.) on file in the above court, as the printed record has not as yet been prepared.)

sulphate, (R.T. 43), and a prescription issued to A.R. Brandon for 160 hypodermic tablets of morphine sulphate, grains 40 (R.T. 44), the contention of the State being that as to each of these prescriptions the doctor had kept no record as required by the Narcotic Act.

Petitioner was a witness in his own behalf and offered in evidence two cards, one showing prescriptions for narcotics issued to A. E. Black and the other showing prescriptions issued for narcotics to A. R. Brandon. These cards were marked respectively Defendant's Exhibits L and M in evidence.

(Throughout the trial in the Superior Court these cards were referred to as the "Black case record card" and the "Brandon case record card" and for brevity will be referred to as the "Black card" and the "Brandon card".)

These cards covered the issuance of prescriptions for a great number of months and included the two prescriptions relied on by the State. Petitioner testified at the first Municipal Court trial that each of the entries on these cards was made at or about the time it bore date. As stated above the jury found the defendant not guilty on each charge.

On September 17, 1939, another complaint numbered 425,187, was filed in the Municipal Court charging the defendant with thirty specific violations of Section 1-d of the Narcotic Act. Of these thirty counts, 25 thereof involved prescriptions issued to Mrs. Black and to Brandon and which the State claimed appellant had kept no record of. Of these 25

prescriptions 22 appeared on the Black and Brandon cards, as aforesaid.

(This second Municipal Court charge will be referred to as "the second Municipal Court trial".)

This second Municipal Court action went to trial before a jury on January 10, 1940, and terminated on February 17, 1940, by the jury returning a verdict finding the defendant "not guilty" on 27 of the counts including the 22 counts predicated on the Black and Brandon prescriptions, *records of which appeared on the Black and Brandon cards,* and finding the defendant "guilty" on the three counts *where no record of such three prescriptions appeared on any case record cards of appellant.* At this trial the State offered in evidence many prescriptions written by appellant and again appellant testified as a witness in his own behalf, offered in evidence the Black and Brandon cards, and testified that the entries thereon were made at or about the time they bore date. The State contended that the cards were false, fabricated and antedated and had been prepared by appellant after August 30, 1939. In support of this contention the State offered circumstantial evidence, and an expert on inks and writing, E. O. Heinrich, who testified that such entries were made on the cards at about the time claimed by the State. In rebuttal appellant produced other experts in support of the verity of each card and the entries thereon. The issue as to the verity of each of these cards was presented to the jury by proper instructions of the Municipal Court trial judge

and was argued to the jury by respective counsel. The Municipal Judge instructed the jury as follows:

> "You will further understand that the question in dispute in this case, *whether or not the defendant's records are false*, is not for the expert to determine. *That question is alone for you to determine from all the testimony in the case.*"

Thus, in the second Municipal Court trial, the question was directly in issue as to whether the Black and Brandon cards were true and correct and the entries made thereon at or about the time they bore date, the jury found on this question in favor of appellant by returning the 22 verdicts of not guilty on the same number of counts where the date and narcotic prescriptions appear on the Black and Brandon cards. In other words in the second Municipal Court trial *the jury found, on an issue directly presented, that neither the Black nor the Brandon card was false, fabricated or antedated.*

On November 9, 1939, the present indictment was filed in the Superior Court. (Cl. Tr. 2-26.) Count one of the indictment charged the defendant with committing perjury in the first Municipal Court trial by testifying that an entry on the Brandon card was made on the date indicated on the card. (Cl. Tr. 1-5.)

The second count of the indictment charged defendant with committing perjury at the first Municipal Court trial in testifying that various entries on the Black card were made at or about the time they bore date. (Cl. Tr. 5-11.)

The third count of the indictment charged defendant with offering in evidence as true and genuine, at the first Municipal Court trial, the Black record card knowing that it had been fraudulently altered and antedated. (Cl. Tr. 11-14.)

The fourth count of the indictment charged defendant with having offered in evidence at the first Municipal Court trial, as true and genuine, the Brandon record card knowing the same to have been fraudulently altered and antedated. (Cl. Tr. 14-18.)

The fifth count of the indictment charged defendant with having, between August 18, 1939, and October 3, 1939, prepared a false and antedated record, etc., to wit: the Black card, for the purpose of producing it, etc., as genuine and true at the first Municipal Court trial. (Cl. Tr. 18-21.)

The sixth count charged the defendant with having, between August 18, 1939, and October 3, 1939, prepared a certain false and antedated record, to wit: the Brandon card, for the purpose of offering it as true and genuine in the first Municipal Court trial. (Cl. Tr. 21-25.)

The indictment related solely to the proceedings had at the first Municipal Court trial. No offense is alleged to have been committed at the second Municipal Court trial.

Before the trial of petitioner on the charges contained in the indictment, the second Municipal Court trial had been completed, the judgments and verdicts of not guilty rendered therein had become final and

the question, as between the State and petitioner, of the truth and verity of the Black and Brandon cards had been determined by the jury therein.

From the inception of the instant proceedings in the state courts, petitioner urged that the doctrine of *res judicata,* as embodied in Sections 1908 and 1911 of the California Code of Civil Procedure and as it inherently exists in our jurisprudence, was fully applicable to criminal prosecutions including perjury and preparing and offering false evidence. The respondent court held the doctrine to be applicable to criminal cases but held that perjury cases were an exception to this well established principle of jurisprudence.

The California State Narcotic Act, under which the prosecutions were had in the *first* Municipal Court trial, was repealed in its entirety on September 19, 1939 when the Health and Safety Code was adopted. (Cal. Stats. 1939, Ch. 60, p. 483.) This repeal date was prior to the trial and acquittal in the *first* Municipal Court case. Petitioner contended that the first municipal trial was invalid as following the repeal of the Narcotic Act and that no perjury or kindred offense could be committed in a void trial. The Health and Safety Code contained a purported saving clause, Section 4, which petitioner contended was in violation of the due process and equal protection clauses of the Fourteenth Amendment. The respondent court upheld the savings clause and refused to decide the constitutional question raised.

STATEMENT OF THE CONSTITUTIONAL QUESTIONS INVOLVED.

The constitutional questions involved are as follows:

1. As the doctrine of *res judicata* is a fundamental principle of justice (*United States v. Oppenheimer*, 242 U. S. 85, 61 L. Ed. 161) applicable to all cases, criminal and civil alike, does not the decision of respondent court, holding such doctrine inapplicable to prosecutions for perjury, run counter to the Fourteenth Amendment guaranteeing due process of law and the equal protection of the laws?

2. The purported saving clause of the California Health and Safety Code (Cal. Stats. 1939, Ch. 60, p. 483) attempts to save "Any action or proceeding commenced before this code takes effect." As this section makes an arbitrary distinction between those who violated the State Narcotic Act before September 19, 1939, by subjecting to prosecution and punishment those against whom an accusation had been filed prior to that date and giving immunity to those against whom no such accusation had been filed, is not this purported saving clause void as being in violation of the equal protection of the laws clause of the Fourteenth Amendment?

JURISDICTIONAL STATEMENTS.

(a) The jurisdiction of this court is invoked under section 237(b) of the Judicial Code of the United States.

(b) The decision and judgment of the respondent District Court of Appeal was rendered on May 2,

1941. A petition for hearing by the Supreme Court of the State of California was denied on May 29, 1941.

(c) The respondent District Court of Appeal is the highest court of the State of California in which a decision could be had in the instant case respecting the questions involved. (Cal. Const., Art. VI, Sec. 4b.)

(d) The first statute of California, the validity of which is involved, is Section 4 of the California Health and Safety Code and will be found in Cal. Stats. 1939, Ch. 60, p. 483, and reads as follows:

> "Any action or proceeding commenced before this code takes effect, and any right accrued, is not affected by this code, but all procedure thereafter taken therein shall conform to the provisions of this code as far as possible."

The second statute of California, the validity of which, as construed by respondent court, is involved is Section 1908 of the California Code of Civil Procedure, reading, in part, as follows:

> "The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows: * * * 2. In other cases the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties * * *."

(e) The grounds upon which it is contended that the questions involved are substantial.

Neither the crime of perjury nor that of offering false evidence can occur except in a valid judicial proceeding. A trial held under a statute that has been repealed is not a valid proceeding. The Health and Safety Code repealed the State Narcotic Act prior to the first municipal court trial. The purported saving clause was inoperative as calling for an unequal application of the law by unjustly discriminating between those who had violated the repealed Narcotic Act by allowing prosecutions to be continued where an accusation had been filed before such repeal and prohibiting such prosecutions where no accusation had been so filed. A denial of the equal protection and equal application of the laws is in itself a substantial matter. The failure of the respondent court to pass upon the constitutional question involved is likewise a matter of substance. For the respondent court to so construe the saving clause as to make it operate in a manner directly opposed to its express terms is to deprive petitioner and all others in like circumstances of the benefit of laws as enacted resulting in the deprivation of liberty without due process of law.

The doctrine of *res judicata* is a fundamental principle of justice. Any action by a state, which deprives an accused of the benefit of a fundamental principle of justice or which runs counter to our conceptions of those fundamental principles of justice which lie at the base of our institutions, is a denial of due process of law. Where such denial results in the deprivation of liberty it presents a substantial question of both law and justice. Fundamental principles

of justice must operate uniformly and without exception. To hold that such fundamental principle applies in all cases save one is to make an unjust discrimination resulting in the denial of due process and the equal application of the laws.

(f) The question of the repeal of the Narcotic Act and unconstitutionality of the purported saving clause in the Health and Safety Code was first raised in respondent court by petitioner's briefs. That such was the case and the manner in which respondent court passed on the questions appears from the following portion of the court's decision:

> "The appellant next complains that because of the repeal of the State Narcotic Act effective September 19, 1939, his trial in the municipal court occurring after that date was a nullity for perjury committed during the course of the former trial. He bases his argument on the contention that when the legislature adopted the Health and Safety Code effective September 19, 1939, (Statutes 1939, p. 483) it failed to provide a saving clause covering offenses committed under the former act. In this the appellant is in error. Section 2 of the Health and Safety Code reads as follows: 'The provisions of this code in so far as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as restatements and continuations, and not as new enactments.' Section 4 reads as follows: 'Any action or proceeding commenced before this code takes effect, and any right accrued, is not affected by this code, but all procedure thereafter taken therein shall conform to

the provisions of this code as far as possible.' If this language is insufficient to disclose the legislative intent to effect a mere codification and clarification of the existing statutes without affecting the rights and obligations under those statutes, that legislative intent must be inferred from the fact that in reference to the subject matter here involved the new statute was a mere restatement of the provisions of the former. This subject is fully discussed in the recent opinion of *Sobey v. Molony,* 40 Cal. App. (2d) 381, in which numerous cases are cited. But the appellant argues that section 4 of the Health and Safety Code is unconstitutional because perchance one might have violated the provisions of the State Narcotic Act prior to the effective date of the codifying act with no proceedings taken against him before that date, and hence the section would discriminate favorably to him and against those in the same position as to whom proceedings had been commenced before that date. We need not discuss this question in its constitutional phases as the section could be disregarded entirely and the same result would follow because of the settled rule that, independent of the saving clause, a person may lawfully be prosecuted under a reenacted or codified statute for a crime committed prior to the date of the codification."

The manner of raising the question *res judicata* and the stages in the proceeding where raised are as follows:

Immediately upon the start of the trial the following stipulations were entered into between petitioner and the State:

1. That the Black and Brandon cards were offered in evidence at the *second* Municipal Court trial by petitioner, that the State claimed at that trial that they had been fabricated and antedated by petitioner and that such claim was one of the matters argued and submitted to the jury. (R. T. 9.)

2. That at the second Municipal Court trial the State offered expert testimony in support of its claim that the cards were fabricated and additions made thereto and that the State announced to the jury at the trial that such was the State's theory of the case. (R. T. 9.)

3. That the two cards as set out in the indictment were before the jury in the second Municipal Court trial. (R. T. 10.)

Following the empanelment of the jury petitioner filed a written motion to dismiss each of the counts set forth in the indictment on the ground that the verity of the Black and Brandon cards had been conclusively adjudicated, as between the State and appellant, by the verdicts of the jury in the second Municipal Court action finding the defendant not guilty of the twenty-two counts of the complaint wherein the record of the narcotic prescriptions issued appeared on the Black and Brandon cards; that such adjudication was *res judicata* of the issue involved and constituted a bar to the instant action. The motion was made on the judgment roll, records, papers, testimony offered and received and the instructions given by the court to the jury in the second Municipal

Court trial. (Cl. Tr. 62 to 66.) The court denied this motion.

Following the prosecutor's opening statement to the jury petitioner moved the court for an order suppressing and excluding any evidence on the part of the State tending to prove or offered for the purpose of proving the antedated character of either the Black or Brandon cards or as tending to prove the falsity of any entry on said cards, also to suppress any evidence to be given by the State's witness Madden relative to the taking or the making of any list of prescriptions at Lewin's Drugstore and the delivery of said list to Attorney Taaffe, also to suppress the testimony of the State's witness Creighton and the State's witness Taaffe dealing with the same matters and things. Said motion was made upon the ground that the correctness and verity of the Black and Brandon cards had been conclusively established as between appellant and the State in the second Municipal Court trial as aforesaid. (R. T. 28-30.) Upon the making of this motion it was stipulated that, in considering the propriety thereof, all the stipulations entered into be considered as part of the present motion. (R. T. 30, 31.)

It was further stipulated that the judgment rolls in the first and second Municipal Court trials, the transcript of the testimony in each of those trials and the charge to the jury in the second trial be considered as part of the motion and the opposition thereto. (R. T. 31 to 33.) The court denied this motion.

Throughout the trial petitioner constantly objected to the admission of any testimony or evidence on the

part of the State tending to prove that either of the cards was false or antedated. The trial court denied each of these objections. (R. T. 66, 67, 68, 74, 194, 196, 281, 312, 313, 335.)

At the conclusion of the State's case petitioner moved the court for an order striking out all testimony—specifying it—tending to prove the alleged false and fabricated character of the cards. The court denied such motion. (R. T. 409 to 413.)

The trial court refused to instruct the jury, as requested by petitioner (C. T. 102), as to the conclusive effect of a prior judgment as announced by Section 1908 of the Code of Civil Procedure, heretofore quoted.

The trial court also refused to instruct, as requested by petitioner in his requested instructions No. 36, 37 and 38 (C. T. 103, 104, 105-107) that the verity of the Black and Brandon cards having been submitted to the jury in the second municipal court trial and that jury having found them to be true and correct, that such adjudication became and was conclusive evidence that the cards were true and correct and not false or fabricated.

On appeal to the respondent court the question was directly raised that the doctrine of *res judicata* was one of equal and universal application and applied in perjury cases and all other criminal prosecutions without exception; that Section 1908 of the Code of Civil Procedure, embodying the doctrine, contained no exceptions.

The respondent court conceded the applicability to criminal cases of the doctrine but held that there was an exception in cases of perjury and that the doctrine did not apply in such cases. The portion of the decision dealing with this matter follows:

> "Though there is some conflict in the authorities upon the question of whether the doctrine of res judicata applies in a criminal proceeding of this nature the great weight of authority is that is has no application. One of the leading cases adopting the majority view is *People v. Niles,* (Ill.) 133 N. E. 252. In that case the appellant had been indicted jointly with another for the larceny of and receiving as stolen property an automobile. The codefendant pleaded guilty and upon his favorable testimony and that of the appellant the latter was found not guilty. Thereafter he was indicted for perjury because of the testimony so given. On appeal the supreme court of Illinois said that the question presented for decision was: 'Can a person acquitted by a jury of an offense of which he denied his guilt as a witness in his own behalf be afterwards prosecuted for perjury predicated upon testimony given by him upon the former trial, where a conviction of the charge of perjury necessarily imports a contradiction of the verdict of not guilty in the former trial?' In answering the question in the affirmative the court said: 'Justice cannot be administered through a system of courts unless there can be some assurance that the finding of the court is based upon testimony truthfully given. Any rule which tends to encourage the giving of false testimony threatens the peaceable

and commendable settlement of controversies by the courts. The general proposition that one can escape punishment for perjury because he succeeded in inducing a jury to credit his false testimony is supported neither by authority nor by reason. If he could, then it follows that the law encourages parties—particularly defendants in criminal cases—to perjure themselves. We must declare that the law is guilty of no such folly. An accused's immunity from punishment for crime must not be made to depend upon the accomplishment of his acquittal in one prosecution by committing the crime for which he claims immunity. It is furthermore the policy of the law that judicial proceedings and judgments shall be fair and free from fraud, and that litigants and parties be encouraged, when sworn as witnesses, to tell the truth, and that they be punished if they do not. The authorities seem now to be unanimous in holding that an acquittal of one charged with crime is no bar to a prosecution for perjury for false testimony given by him at the trial. (Citing numerous cases).'

"In *Jay vs. State*, (Ala.) 37 So. 137, 139, the Alabama court clearly states the reason for the majority rule in the following language: 'The doctrine of res judicata springs out of and is founded upon the principle of estoppel. It rests upon the principle of public policy that there should be an end to litigation—the maxim is, "Interest reipublicae ut sit finis litium." Keeping in view the basic principle and underlying reason —public policy—it is obvious that while public policy on the one hand demands an end of litigation, and hence puts forward the doctrine of res

judicata, yet, on the other, it is manifest that every interest of public policy demands that perjury be not shielded by artificial refinements and narrow technicalities, for perjury strikes at the very administration of the law and holds the courts up to contempt if they allow the perjurer to go unwhipt of justice. In other words, while public policy on the one hand creates the doctrine of res judicata, it also, on the other, requires that perjurers be brought to trial. It would be a monstrous doctrine to hold that a person could go into a court of justice and by perjured testimony secure an acquittal, and because acquitted he could not be tried for his perjury; this would be putting a premium upon perjury and allowing a scoundrel to take advantage of his own wrong. Public policy does not guaranty immunity to criminals, and that is just what we are asked to do in extending the doctrine of res judicata to perjury.'

"It would serve no purpose to cite further cases in support of the majority rule or to attempt to analyze those cited by appellant from the minority. Reference may be had to 37 *A. L. R.* 1290 et seq; 15 *Am. Jur.* p. 45."

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Your petitioner verily believes that he has been deprived of his liberty in violation of the Fourteenth Amendment. The decision of the respondent court is in disregard of the prior decisions of this Court as to the applicability of *res judicata* to all criminal cases

and denies to petitioner a fundamental right that lies at the very base of our democratic institutions and this Court's conception of justice. The refusal to consider the invalidity of the saving clause in the Health and Safety Code denies to petitioner due process of law. To this we add the reasons heretofore advanced as to the substantial character of the questions involved. The writ should issue to correct these errors and restore petitioner's constitutional rights and to prevent the doctrines so erroneously announced by respondent court from becoming binding precedent.

Wherefore, petitioner prays that this Honorable Court issue a writ of certiorari to the District Court of Appeal of the State of California, First Appellate District, Division Two, to the end that the questions involved may be fully presented and argued and justice done in the premises.

Dated San Francisco,
August 21, 1941.

LEO R. FRIEDMAN,
Attorney for Petitioner.

Certificate of Counsel.

I hereby certify that I am counsel for petitioner in the above cause and that, in my judgment, the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco,
August 21, 1941.

LEO R. FRIEDMAN,
Attorney for Petitioner.